TAXATION: Sales tax on coin operated games and devices.
SALES TAX: constitutional.

April 28, 1941

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Honorable Max M. Librach
State Representative
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

> "I would appreciate your rendering an opinion with respect to the legality of certain sections of House Bill No. 344. I call your attention to line 67 of page 3 of said bill, wherein all other coin-operated games, or devices, are subject to the two per cent sales tax. This provision of the Act raises a constitutional question in my mind, and hence my reason for inquiring of you as to its constitutionality.
>
> "I might further add that as a practical matter should your Department hold this Act constitutional, that the collection of this tax would be almost impossible, for the reason that under the sales tax law it is the consumer who must pay the tax and the seller cannot absorb the same. Therefore, anyone who dispenses music or games under this provision would be required to collect the same off of every player.
>
> "I would appreciate receiving your opinion with respect to this matter at your very earliest convenience."

House Bill 344 is the new Sales Tax Act and places a tax of two per cent. upon "all coin operated music boxes, all other coin operated games or devices."

"Sale at retail" is defined as:

> "Any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace;"

It is elementary that the power of the Legislature in matters of taxation for public purposes is unlimited except in so far as restrained by the State or Federal Constitution or inherent limitations on the power to tax. State ex rel. Cement Co. v. Smith, 90 S. W. (2d) 405, 338 Mo. 409; Leonard v. Maxwell, 3 S. E. (N. C.) 316, Cooley on Taxation (4th Ed.) Vol. 1, page 171.

As said in State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S. W. (2d) 398, l. c. 402:

> "The inherent power of the Missouri General Assembly to levy taxes, independent of constitutional grant, is subject only to limitations prescribed in the Federal and State Constitutions. State ex rel. v. St. Louis, 318 Mo. 870, 894, 2 S. W. (2d) 713, 720 (11); Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294, 307; State ex rel. v. Smith, 338 Mo. 409, 90 S. W. (2d) 405, 406 (1)."

The definitions used in the sales tax statutes, rather than the popular meanings, control the interpretation to be given to the words used in the law. Thus, "sale" means whatever transaction the statute specifies. As pointed out in Sandberg v. Iowa State Board, 225 Ia. 103, 278 N. W. 643, "The Legislature is its own lexicographer."

Therefore, our General Assembly in providing that certain services are a sale at retail, by its definition brings those services within the purview of the Sales Tax Act.

We direct your attention to the fact that other jurisdictions have placed a similar tax upon services as well as upon tangible personal property, which designations have been upheld by the courts. Renn v. Bedford, 84 Pac. (2d) (Colo.) 827; Indiana Creosoting Co., v. McNutt, 210 Ind. 656, 5 N. E. (2d) 310, Charleston Transit Co., v. James, 4 S. E. (2d) (W. Va.) 297.

It is "so clear as not to be open to question" that this tax is an excise tax and not a property tax. State ex rel. Cement Co., v. Smith, 90 S. W. (2d) 405, 338 Mo. 409. This is in accord with the great weight of authority. Stewart Dry Goods Co. v. Lewis, 295 U. S. 550, 79 L. Ed. 1054, 55 Sup. Ct. 525, and cases collected in 89 A. L. R. 1432, 110 A. L. R. 1485, 117 A. L. R. 847 and 128 A. L. R. 893.

For the purpose of this opinion we do not deem it necessary to designate more specifically the nature of this tax in so far as it relates to services. We note, however, one writer on the subject has said, referring to the Missouri law, that "such taxes are on the border line between sales taxes and gross income taxes." Therefore, we rule that since the Legislature has the plenary power to levy taxes, subject only to specific constitutional inhibitions, that a tax may be

imposed upon charges and fees on all coin operated music boxes and all coin operated games or devices, and that such tax is an excise tax.

You ask in your request as to the constitutionality of this provision. Such a broad request necessarily involves, in the words of Shakespeare, "a question deep and all kind of arguments." We will restrict ourselves to those provisions of the Federal and State Constitutions which this specific clause might contravene and will not consider those sections of the Constitution which might be violated by the Sales Tax Act as a whole. It is a well-settled rule of statutory construction that a statute is presumed to be constitutional. Poole & Creber Market Co., v. Breshears, 125 S. W. (2d) 23, 343 Mo. 1133, Ward v. Public Service Com., 108 S. W. (2d) 136, 341 Mo. 227, and in order to render a statute unconstitutional it must appear so beyond a reasonable doubt. State ex rel. School District v. Neaf, 130 S. W. (2d) 509, 344 Mo. 905; Hull v. Baumann, 131 S. W. (2d) 721.

Article X, Section 3 of the Constitution of Missouri, provides as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The question of whether a tax of like nature is uniform upon the same class of subjects within the territorial limits of the authority imposing the tax, has been sustained by our court in State v. Hallenberg-Wagner Motor Co., 108 S. W. (2d) 398. In that case the Supreme Court of Missouri held that the sales tax of 1937, which is similar to the instant act, did not violate Article X, Section 3 "because the burden falls alike on all taxpayers in substantially the same situation."

It is well settled that a wide latitude is accorded the taxing authorities in the selection of subjects for taxation. Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929. The limitation on the legislative discretion is that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 40 Sup. Ct. 560, 64 L. Ed. 989.

As was said in Ex Parte Asotsky, 319 Mo. 810, 5 S. W. (2d) 22, l. c. 27, 62 A. L. R. 95:

> "The question of the propriety of a classification, measured by section 3, art. 10, is largely one for the Legislature. The courts may not declare a particular classification unreasonable and violative of said section 3, art. 10, unless the classification made cannot be justified on any reasonable grounds. So long as the tax imposed bears alike upon every one within the class and the classification can be justified upon any reasonable theory, the tax cannot be delcared violative of section 3, art. 10."

Therefore, since the tax is upon all coin operated games or devices it will be seen that the tax falls upon all in the class and therefore does not violate Section 3, Article X, of our our Constitution.

While there is no constitutional inhibition against double taxation, still we point out that in State v. Hallenberg-Wagner Motor Co., supra, this type of tax, since it is an excise tax, was held not to be double taxation and does not violate that rule of law that double taxation is not favored and is not to be presumed. We find no other constitutional provisions which this clause might contravene.

You point out in your request that the collection of this tax from those who use coin operated games anddevices would be most impracticable. We can only refer to what was said in Rinn v. Bedford, 84 Pac. (2d) (Colo.) 827, which case involved a sales tax upon services. The court said (l. c. 829):

> "The method of collection is not shown to be unlawful, in fact it seems the only practical method; but this again is purely a matter of policy left by our Constitution to the discretion of the legislative branch of our state government. The wisdom or unwisdom of the legislation is not for us to decide."

This is in accord with the rule in Missouri as laid down in State ex rel. Parish.v. Young, 38 S. W. (2d) 1020, in which our Supreme Court said (l. c. 1023):

> "The power to levy and collect taxes is purely statutory, and has been confided to the Legislature and not the courts. De Arman v. Williams, 93 Mo. 158, 163, 5 S. W. 904; State ex rel. v. Ry. Co., 87 Mo. 236; City of Carondelet v. Picot, 38 Mo. 125, 130; 25 R. C. L. pages 27 to 29."

The method of collection is a matter with which we have nothing to do.

## Conclusion

It is, therefore, the opinion of this Department that a two per cent. "sales tax" as imposed by House Bill 344 upon "all coin operated music boxes, all other coin operated games or devices," is constitutional and a proper exercise of the taxing power of the General Assembly.

Respectfully submitted,

APPROVED:

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